Amicus Curiarum

VOLUME 31
ISSUE 12 DECEMBER 2014

A Publication of the Office of the State Reporter

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http://www.mdcourts.gov/opinions/coa/2014/73a12ag.pdf

ATTORNEY MISCONDUCT – DISCIPLINE – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action ("Petition") against Respondent, Joseph M. Kum. The Petition alleged violations of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") and the Maryland Rules in connection with Respondent's misappropriation of client funds, failure to communicate with his client, and failure to respond to lawful demands for information.

The Court of Appeals assigned the matter to the Honorable Krystal Q. Alves of the Circuit Court for Prince George's County (the "hearing judge"). After an evidentiary hearing, at which Respondent did not appear, the hearing judge found the following facts:

On May 2, 2012, Petitioner was notified of an overdraft on an attorney trust account maintained by Respondent. Petitioner requested that Respondent provide an explanation for the overdraft. Respondent explained that a settlement check that he had deposited into his trust account had been returned by the issuing bank due to a missing endorsement. Respondent said that he then transferred funds from his general account to his trust account in order to cover a check he had written to a client. After he received the required endorsement, Respondent re-deposited the settlement funds into his trust account. Respondent also informed Petitioner that he had likewise transferred funds from his general account to cover a trust account check made payable "ACC Telecom." There was no indication that the "ACC Telecom" check related to a client matter.

Petitioner repeatedly asked Respondent to verify that the transferred funds from his general account had been removed from his trust account, and to provide an explanation of the "ACC Telecom" check. In or about August 2011, Respondent left the country to travel to Ghana. Even though Petitioner granted Respondent two extensions to reply to its requests, Respondent failed to respond.

In January 2008, David Miller ("Mr. Miller") and three other individuals retained Respondent as their primary attorney in a harassment claim. In February 2009, the four clients settled their claims for $33,350 per client (after subtracting attorney's fees). At the time of settlement, Mr. Miller was incarcerated in North Carolina, so he authorized Respondent to receive and hold his settlement proceeds in trust. Respondent disbursed portions of the settlement proceeds to Mr. Miller and Donna Williams, the mother of Mr. Miller's child, in several installments.

When Mr. Miller was released from incarceration, he requested the balance of his settlement proceeds from Respondent. Respondent was out of the country, but a lawyer from Respondent's law firm told Respondent to contact Mr. Miller as soon as possible. Respondent did not contact Mr. Miller or return to the United States. In total, Respondent only disbursed $21,833 of the $33,350 owed to Mr. Miller.

Based upon these factual findings, the hearing judge concluded, by clear and convincing evidence, that Respondent had violated MLRPC 1.4(a); MLRPC 1.15(a) and (d); MLRPC 1.16(d); MLRPC 8.1(b); MLRPC 8.4(c) and (d); and Maryland Rule 16-607.

Held:

Neither Respondent nor Petitioner filed exceptions to the hearing judge's findings of fact. The Court, therefore, treated those findings as established for the purpose of determining the appropriate sanction. Also, neither Respondent nor Petitioner filed exceptions to the hearing judge's conclusions of law. Based on the Court's *de novo* review of the record, the Court agreed with the hearing judge that Respondent violated MLRPC 1.4(a); MLRPC 1.15(a) and (d); MLRPC 1.16(d); MLRPC 8.1(b); MLRPC 8.4(c) and (d); and Maryland Rule 16-607.

The Court held that Respondent willfully failed to provide Mr. Miller with the balance of the settlement proceeds owed to him and failed to render a full accounting of the funds. Such misconduct amounts to the misappropriation of client funds. The default sanction for the intentional misappropriation of funds is disbarment. Respondent failed to provide any compelling extenuating circumstances that might justify a lesser sanction. The Court, therefore, held that Respondent's misconduct warrants a sanction of disbarment.

Attorney Grievance Commission of Maryland v. Gayton Joseph Thomas, Jr., Misc. Docket AG No. 63, September Term 2013, filed November 20, 2014. Opinion by Harrell, J.

McDonald, J., concurs.

http://www.mdcourts.gov/opinions/coa/2014/63a13ag.pdf

ATTORNEY MISCONDUCT – DISCIPLINE – DISBARMENT

Facts:

In this attorney disciplinary action, the Attorney Grievance Commission of Maryland ("Petitioner" or "the Commission"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action ("PDRA") against Gayton Joseph Thomas, Jr., Esquire ("Respondent" or "Thomas"), charging him with violations of the Maryland Lawyers Rules of Professional Conduct ("MLRPC") arising out of his representation of Mohamed Abou Sarieh Hamed ("Hamed"). Respondent was charged with violating MLRPC 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(c) and (d) (Misconduct). The PDRA served on Thomas alleged that Respondent gave incorrect advice to a client in an immigration matter, told the client that he did not need to appear at an immigration hearing and then did not appear himself (with the result the client was ordered *in absentia* removed from the United States), accepted payment from the client, and then stopped responding to all inquiries from the client as to the status of the case. The PDRA alleged further that Respondent did not respond to lawful inquiries from Bar Counsel for information concerning the client's complaint. Respondent did not file (timely or otherwise) an Answer to the PDRA.

The case was assigned to a hearing judge to conduct an evidentiary hearing and render findings of fact and recommended conclusions of law with regard to the charges. As Respondent filed no Answer to the PDRA, Petitioner filed a Motion for Order of Default. An order granting the motion was signed and entered. Respondent did not move to vacate the order, nor did he appear at the hearing. Bar Counsel called only Hamed to testify at the hearing. The hearing judge found Hamed's courtroom testimony regarding the details of his alleged interactions with Respondent "unclear in some areas and not credible in others." In light of this determination, the hearing judge found that the remaining credible evidence adduced by the Commission proved, by clear and convincing evidence, only a violation of MLRPC 8.1(b).

At the outset of her opinion, the hearing judge recognized that, pursuant to Maryland Rule 2-323(e), "[a]verments in a pleading to which a responsive pleading is required . . . are admitted unless denied in the responsive pleading . . . ." She conceded that, "if reviewed in a vacuum and accepted as true, the averments set forth in the [PDRA] are sufficient to establish violations of MLRPC 1.1, 1.3, 1.4, 8.1, and 8.4 as alleged by the Commission." From her perspective, however, "the evidence submitted at the hearing casts doubt on the claims made in the petition."

Curiously, pursuant to Rule 2-323(e), and acknowledged elsewhere in her opinion, she did deem one fact admitted by virtue of Respondent's default: Thomas was admitted to the Bar of the Court of Appeals of Maryland on 21 June 2000.

Petitioner filed written exceptions to the hearing judge's Findings of Fact and Conclusions of Law. The primary thrust of Petitioner's exceptions was that the hearing judge's findings of fact were incompatible with the Order of Default entered previously in the case. Petitioner took exceptions also to the judge's credibility determinations, a variety of specific factual findings, and the hearing judge's conclusions of law as well.

Held:

The Court of Appeals found that Respondent violated all of the MLRPC with which he was charged. Relying on *Attorney Grievance Commission v. Lee*, 390 Md. 517, 890 A.2d 273 (2006), *Franklin Credit Management Corporation v. Nefflen*, 436 Md. 300, 81 A.3d 441 (2013), and *Attorney Grievance Commission v. Harmon*, 433 Md. 612, 72 A.3d 555 (2013), the Court held that the well-pleaded averments in the PDRA should have been accepted as admitted as they were never denied by Respondent, and an Order of Default was entered in the case and not vacated. The Court did not consider the hearing judge's findings of fact and conclusions of law (or Bar Counsel's exceptions to them) because there was no apparent need for a full-blown evidentiary hearing in the case.

Based on the deemed admissions, the Court concluded that the admitted facts were sufficient, to a clear and convincing standard, to warrant concluding that Respondent violated MLRPC 1.1, 1.3, 1.4, 8.1(b), and 8.4(c) and (d). Respondent's behavior violated MLRPC 1.1 through his failure to appear at Hamed's 9 September 2010 hearing, telling Hamed that he did not need to appear at the hearing, and suggesting that an asylum application could be filed anywhere other than in Immigration Court. MLRPC 1.3 was violated by the same conduct, as well as Respondent's failure to respond to the Hameds as they attempted to ascertain the status of his case, his failure to inform them that Hamed had been ordered removed, and his acceptance of payment for work that he did not do. Respondent's complete lack of communication with the Hameds after 9 September 2010 violated MLRPC 1.4. MLRPC 8.1(b) was violated when Respondent failed utterly to respond to the Commission's repeated lawful demands for information. The conduct described previously violates MLRPC 8.4(c) and (d).

The Court held that disbarment was the appropriate sanction for Respondent's violations. As Respondent did not participate in any way during the proceedings, there was no apparent evidence implicating the presence of any mitigating factors. The Court identified several aggravating factors, including Respondent's intentional failure to participate in the disciplinary proceedings or comply with the information requests of the Commission, which suggested a refusal to acknowledge the wrongful nature of his conduct and indifference to making restitution

to Hamed. The Court considered the vulnerable nature of Hamed's status as an immigrant client. In light of Respondent's flagrant neglect of client affairs, failure to communicate with clients, and failure to respond to lawful inquiries from Bar Counsel, Respondent's misconduct warrants the sanction of disbarment.

Attorney Grievance Commission of Maryland v. Patrick Guy Samuel Marie Merkle, Misc. Docket AG No. 17, September Term 2013, filed November 24, 2014. Opinion by Greene, J.

Harrell, Battaglia and Watts, J.J., dissent.

http://www.mdcourts.gov/opinions/coa/2014/17a13ag.pdf

ATTORNEY DISCIPLINE – PETITION DISMISSED

Facts:

Bar Counsel, acting at the direction of the Attorney Grievance Commission, filed a Petition for Disciplinary or Remedial Action against Respondent, Patrick Merkle, charging Merkle with violations of the Maryland Lawyers' Rules of Professional Conduct 1.1, 1.2, 1.3, 1.4, 1.6, 7.3, and 8.4. These violations allegedly stem from Respondent's relationship and interactions with his client, Ms. Coates. Respondent met Ms. Coates in October 2008, in the office of the district court clerk. Respondent informed Ms. Coates that she was filling out a protective order form incorrectly, gave her his business card, and informed her that he was an attorney. The two discussed her possible divorce case as well as a separate case Respondent was researching. The two subsequently met at a nearby park where Respondent was completing investigatory work for a separate case. After discussing Ms. Coates's case further, the two exchanged telephone numbers and departed soon thereafter.

Prior to entering into a formal agreement, Respondent and Ms. Coates communicated extensively via email. Importantly, Respondent sent Ms. Coates a proposed course of action on December 10, 2008, which also advised her to consider other attorneys if she had any reservations. During this extensive communication, Respondent also told Ms. Coates she that if she needed a place to say, she could stay in an apartment he ordinarily rents. Respondent became friends with Ms. Coates on Facebook in 2009. While Respondent commented on Ms. Coates's Facebook photographs on two occasions, Facebook communications ceased after the execution of the retainer agreements in March 2010.

Respondent filed both a divorce action and another civil action alleging libel and slander against Ms. Coates's husband. During the course of Respondent's representation, Ms. Coates, Mr. Black (Ms. Coates's husband), Mr. Burton (husband's counsel) and Respondent met in the courthouse to discuss how Ms. Coates would obtain portions of her personal belongings from the marital home. Respondent offered to move Ms. Coates's personal belongings from her home. Respondent testified that by the time he was finished helping Ms. Coates move, he had a blinding headache. He testified that he told Ms. Coates that he was going to sit in his vehicle with the air conditioning running until his headache subsided enough that he could drive away. Respondent testified that Ms. Coates told him that he should stay inside her apartment, but the only available space to sit, other than the stools in the kitchen, was half of her queen bed. Every

available space on sofas, chairs and half of her mattress were occupied with boxes, papers and other items left where they had been placed when she moved into the new residence. Respondent testified that he laid down on her bed for about 20 minutes before leaving, during which time both Respondent and Ms. Coates made phone calls.

On or about September 14, 2011, Ms. Coates informed Respondent that she was terminating his representation. After being informed of his termination, Respondent attempted on various occasions to inquire about the reasons for termination and the steps needed to be taken by Ms. Coates moving forward. The court subsequently struck Respondent from the case. Following Respondent's termination, Ms. Coates filed a complaint with the Attorney Grievance Commission.

Following a hearing in the circuit court, the hearing judge determined that no MLRPC violation had occurred. Petitioner excepted to the hearing judge's conclusions regarding MLRPC 7.3 and 8.4, as well as the judge's factual assessment that Ms. Coates was not a vulnerable individual.

Held: Dismissed.

The Court of Appeals held that the hearing judge's conclusion that no MLRPC violation had occurred was not clearly erroneous and was legally correct. Bar Counsel, in its exceptions, sought to have the Court consider evidence not contained within the hearing judge's findings. Cognizant of the deference accorded to the hearing judge's determinations, the Court declined the invitation to make credibility-based, factual assessments. This deference is appropriate precisely because the hearing judge is in the best position to assess the demeanor-based, credibility of witnesses and make determinations as to the appropriate weight to be accorded to the evidence presented. In making his or her findings, a hearing judge is not required to recount all of the evidence presented; indeed, the judge may "pick and choose" from the wide array of evidence presented. Absent an indication that the hearing judge's findings were clearly erroneous, the Court will not disturb the hearing judge's findings. Based on the hearing judge's factual determinations, which were supported by competent evidence in the record, the Court was unable to conclude that any violation of the Rules had occurred.

Attorney Grievance Commission of Maryland v. Sandra Lynn Reno, Misc. Docket AG No. 5, September Term 2013, filed November 19, 2014. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2014/5a13agb.pdf

ATTORNEY DISCIPLINE – SANCTIONS – SIXTH-MONTH SUSPENSION

Facts:

The Attorney Grievance Commission ("the Commission"), Petitioner, charged Sandra Lynn Reno ("Reno"), Respondent, with violating Maryland Lawyers' Rule of Professional Conduct ("MLRPC") 8.4.

A hearing judge found the following facts. Reno gave a handgun to Cortney Stevens ("Stevens"), who could not legally possess a regulated firearm. Reno should have known that Stevens could not legally possess a regulated firearm, as she knew that the Firearms Registration Section of the Maryland State Police had disapproved Stevens's application to buy the same kind of handgun.

In *Attorney Grievance Comm'n v. Reno*, 436 Md. 504, 505, 83 A.3d 781, 781 (2014), the Court of Appeals held that Reno had violated MLRPC 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice) by circumventing the law and giving the handgun to Stevens. "Instead of determining an appropriate sanction on [its] own initiative, [the Court] g[a]ve Reno and the Commission the opportunity to recommend a sanction[.]" *Id*. at 512, 83 A.3d at 786. The attorney discipline proceeding was before the Court for determination of the appropriate sanction.

Held:

The Court of Appeals agreed with the Commission that the appropriate sanction for Reno's misconduct was a six-month suspension from the practice of law in Maryland. Reno knew that the Firearms Registration Section of the Maryland State Police had disapproved Stevens's application to buy a handgun. Despite this knowledge, Reno intentionally gave the same kind of handgun to Stevens, who, as Reno should have known, could not legally possess a regulated firearm. And, as the hearing judge found, there was a "potential danger" in giving a deadly weapon to a convicted felon. Reno's misconduct was aggravated by substantial experience in the practice of law and unlawful conduct. Reno's misconduct was mitigated by the absence of prior attorney discipline, full and free disclosure to the Commission, and a finding of character for honesty.

Deborah Hiob, et al. v. Progressive American Insurance Company, et al., No. 4, September Term 2014, filed November 20, 2014. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2014/4a14.pdf

APPEALS – ENTRY OF FINAL JUDGMENT – SEPARATE DOCUMENT REQUIREMENT

Facts:

Following a fatal car accident, Petitioners Deborah Hiob, Douglas Hiob, Margaret Nelson, and the personal representatives of Virginia Hiob and Laura Dusome (collectively the "Hiobs") brought suit against two insurance companies regarding uninsured motorist coverage applicable to the occupants of one of the vehicles. All of the Petitioners brought an action for declaratory judgment against Respondent Progressive American Insurance Company ("Progressive"). The personal representative of Virginia Hiob also brought a claim against a second insurance company, Erie Insurance Exchange ("Erie").

In October 2009, the Circuit Court for Baltimore County granted summary judgment in favor of Progressive on all claims brought against Progressive. Over a year later, the personal representative of Virginia Hiob and Eire signed a voluntary dismissal, dismissing all claims against Erie with prejudice. The voluntary dismissal was docketed on January 10, 2011. On February 8, 2011, the Circuit Court signed an order entering final judgment and incorporating the 2009 summary judgment order. On February 15, 2011, before the order of final judgment was docketed but 36 days after the voluntary dismissal was docketed, the Hiobs filed a notice of appeal from the 2009 order granting summary judgment in favor of Progressive.

The Court of Special Appeals dismissed the Hiobs' appeal as untimely, concluding that the docketing of the voluntary dismissal on January 10, 2011 resolved the only remaining claim in the case and therefore constituted the entry of final judgment and started the 30 day deadline for filing an appeal. *Hiob v. Progressive Am. Ins. Co.*, 212 Md. App. 734, 71 A.3d 184 (2013), *reconsideration denied* (Sept. 3, 2013).

Held: Reversed.

The Court of Appeals held that the Hiobs' notice of appeal was timely. The Court observed that the time for filing an appeal does not begin to run under Rule 8-202(a) until the entry of final judgment, which means that the judgment is set forth on a separate document consistent with Rule 2-601(a) and docketed consistent with Rule 2-601(b). The Court concluded that the voluntary dismissal did not comply with the separate document requirement of Rule 2-601(a) because it did not provide a clear indication that judgment had been rendered and it was not signed by either the clerk or the judge. The Court also concluded that the docket entry applicable

to the voluntary dismissal did not satisfy Rule 2-601(b) because it did not indicate that final judgment had been rendered. Accordingly, because the voluntary dismissal did not set forth a judgment on a separate document and because the docket entry did not satisfy Rule 2-601(b), the docketing of the voluntary dismissal could not act as the effective entry of final judgment and could not start the deadline for filing a notice of appeal from the grant of summary judgment in favor of Progressive.

It was not until the February 8, 2011 order was docketed that there was a final judgment set forth on a separate document and entered on the docket in accordance with Rule 2-601. Thus, the time for filing an appeal from the summary judgment order did not begin until the February 8 order was docketed. Even though the Hiobs' notice of appeal was filed before the February 8 order was docketed, it was timely under Rule 8-602(d) because it was filed after the February 8 order was signed.

Traimne Martinez Allen v. State, No. 16, September Term 2014, and *Howard Bay Diggs v. State*, No. 17, September Term 2014, filed November 26, 2014. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2014/16a14.pdf

CRIMINAL LAW – STATUTORY INTERPRETATION – DNA COLLECTION ACT – PUB. SAFETY ART. § 2-510 – ADMISSIBILITY OF DNA MATCH EVIDENCE

Facts:

Petitioners and co-defendants, Traimne Martinez Allen ("Allen") and Howard Bay Diggs ("Diggs"), were convicted in the Circuit Court for Montgomery County of attempted first degree murder, first degree burglary, robbery with a deadly weapon, attempted robbery with a deadly weapon, conspiracy to commit robbery, two counts of first degree assault, and two counts of using a handgun in the commission of a crime of violence, stemming from an alleged home invasion and robbery at the apartment of the victims, Sentayehu Negussie and Jeremy Gordon. After the incident, police officers investigating the robbery recovered various items from the scene. DNA samples were taken from five of the items: two black bandanas (one found on a sidewalk and one found in the apartment stairwell), a Pittsburgh Pirates baseball hat, a black t-shirt, and an orange juice bottle. The Montgomery County Crime Laboratory analyzed the DNA samples and compared them to samples taken from the suspects and the victims. When there was no match, the laboratory uploaded the resulting DNA profiles to the Federal Bureau of Investigation's ("FBI") Combined DNA Index System ("CODIS"). The baseball hat produced a mixture of DNA profiles, the major contributor of which was determined to be Allen. In addition, two samples, one taken from one bloodied black bandana and one from the orange juice bottle, yielded DNA profiles that "matched" DNA records in CODIS associated with individuals other than any of the participants in the June 23, 2009 incident. Specifically, a DNA sample taken from the bloodied black bandana produced a "match" to a DNA profile of an individual named Richard Debreau, which had been previously uploaded to CODIS by the Montgomery County Crime Laboratory. In addition, a sample taken from the orange juice bottle produced a "match" to a DNA profile of an individual named Mohamed Bangora, which had been previously uploaded to CODIS by the Maryland State Police.

During a pre-trial motions hearing, Allen's counsel proffered to the court that Richard Debreau was a known gang member who had recently pled guilty to a "nearly identical type of robbery." The defense sought to have the other DNA samples taken from the crime scene compared to Debreau's DNA, because, according to Allen's counsel, "the more Richard Debreau DNA found on the scene, the more exculpatory I suggest this may well be." The court then denied Allen's general motion to compel on the ground that the defense was getting all of the discovery entitled to it. Defense counsel made no additional requests for testing of Debreau's DNA.

In its case-in-chief, the State did not call an expert to present any DNA evidence. At the conclusion of its case-in-chief, however, the State moved in limine to preclude the defense from questioning Naomi Strickman, a forensic specialist employed by the Montgomery County Crime Laboratory, about CODIS matches and specifically about the DNA profile matches to Debreau and Bangora. The State argued, in part, that Md. Code (2003, 2011 Repl. Vol., 2014 Cum. Supp.), § 2-510 of the Public Safety Article ("PS") prohibits the admission of DNA matches at trial without additional confirmatory testing, which was not done in this case. The trial court granted the State's motion. After their conviction, Petitioners noted an appeal to the Court of Special Appeals. In a reported opinion, the intermediate appellate court affirmed, holding that the DNA match evidence was properly excluded because under "the plain meaning of [PS] § 2-510, evidence of a CODIS match is not admissible at trial—any trial, not just the trial of the individual associated with the DNA record—unless additional testing confirms the match." *Diggs & Allen v. State*, 213 Md. App. 28, 56, 73 A.3d 306, 322 (2013) (emphasis in original). The Court of Appeals granted Allen's and Diggs's petitions for certiorari.

Held: Affirmed.

Md. Code (2003, 2011 Repl. Vol., 2014 Cum. Supp.), § 2-510 of the Public Safety Article ("PS") provides that "[a] match obtained between an evidence sample and a data base entry may be used only as probable cause and is not admissible at trial unless confirmed by additional testing." The plain language of the statute requires that before evidence of a DNA data base "match" may be admitted at trial, the party seeking its admission bears the burden of ensuring that additional testing of the DNA samples is completed to confirm the validity of the match. Such requirement applies equally to a criminal defendant offering evidence of a DNA match to another individual. Such a restriction on the admissibility of evidence does not violate the accused's constitutional right to present a fair defense.

Accordingly, the Court held that Petitioners were required to establish additional confirmatory testing of the DNA match evidence before it would be admissible at trial. Those samples were available in this case. Montgomery County had in its possession a sample of Debreau's DNA, and the Maryland State Police had in its possession a sample of Bangora's DNA. Moreover, where the defendant seeks to introduce evidence of a DNA match of some other individual, the burden is on the defendant to obtain confirmation by additional testing when the State has not performed the additional testing. Petitioners in this case failed to obtain this additional confirmatory testing, absent the apparent inability to do so, and therefore the DNA match evidence was inadmissible at trial for that reason.

Gregory Howard v. State of Maryland, No. 97, September Term 2013, filed November 19, 2014. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2014/97a13.pdf

AUTHORITY TO DENY MOTION TO POSTPONE – MD. CODE ANN., CRIM. PROC. (2001, 2008 REPL. VOL.) § 6-103(b) – MARYLAND RULE 4-271(a)(1) – DENIAL OF MOTION TO POSTPONE – MARYLAND RULE 4-215(b) – SPEEDY TRIAL

Facts:

On October 8, 2008, law enforcement arrested Gregory Howard ("Howard"), Petitioner. The State, Respondent, charged Howard with first-degree rape and other crimes. The Circuit Court for Baltimore City ("the circuit court") postponed trial eight times; Howard requested, either jointly with the State or separately, five of the postponements. Howard discharged two lawyers and expressly waived the right to counsel.

Howard appeared before a trial judge, who was not the circuit court's administrative judge or that judge's designee. Howard requested a postponement and requested the appointment of counsel, alleging that, within the previous week, the State had provided him with discovery materials. The trial judge denied both requests.

On January 31, 2011, trial began. A jury convicted Howard of first-degree rape and first-degree sexual offense. Howard appealed, and the Court of Special Appeals affirmed.

Held: Affirmed.

The Court of Appeals held that any circuit court judge may deny a motion to postpone in a criminal case. Since before Md. Code Ann., Crim. Proc. (2001, 2008 Repl. Vol.) ("CP") § 6-103(b)'s and Maryland Rule 4-271(a)(1)'s predecessors took effect in the 1970s, all circuit court judges have had the discretion to deny motions to postpone. In authorizing only county administrative judges or those judges' designees to grant motions to postpone, CP § 6-103(b)'s and Maryland Rule 4-271(a)(1)'s predecessors did not deprive other circuit court judges of the discretion to deny motions to postpone. The plain language of CP § 6-103(b), Maryland Rule 4-271(a)(1), and their predecessors states that only a county administrative judge or that judge's designee may "change" a trial date (*i.e.*, grant a motion to postpone); neither the statute nor the rule precludes another circuit court judge from declining to change a trial date (*i.e.*, denying a motion to postpone). Permitting any circuit court judge to deny a motion to postpone fulfills CP § 6-103's and Maryland Rule 4-271's purpose, which is to further society's interest in the prompt disposition of criminal trials. CP § 6-103's and Maryland Rule 4-271's purpose is fulfilled by

curbing the number of grants of motions to postpone, not the number of denials of motions to postpone.

The Court of Appeals also held that a trial court does not abuse its discretion in denying a motion to postpone to obtain counsel because the trial court does not ask questions of a self-represented defendant who has expressly waived the right to counsel after being advised of the right to counsel under Maryland Rule 4-215(b) (Express Waiver of Counsel); and that the trial judge did not abuse his discretion in denying Howard's motion to postpone.

The Court of Appeals also held that Howard's right to a speedy trial was not violated. As to the length of the delay, Howard's trial began approximately twenty-eight months after Howard's arrest. In the aggregate, the reasons for the delay were neutral. The State conceded that Howard asserted his right to a speedy trial through motions filed on his own behalf. Howard, however, did not allege that the delay caused him actual prejudice; and a review of the record demonstrated that the delay did not cause any actual prejudice.

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Steven M. Johnson v. State of Maryland, No. 102, September Term 2013, filed November 21, 2014. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2014/102a13.pdf

CRIMINAL PROCEDURE – PETITION FOR DNA TESTING – SEARCHES FOR SCIENTIFIC IDENTIFICATION EVIDENCE

Facts:

Steven Johnson was convicted in 1980 of a first degree sex offense, kidnapping of a child under sixteen and assault and battery in the Circuit Court for Charles County. In 2011, Johnson filed a petition for DNA testing pursuant to Section 8-201 of the Criminal Procedure Article of the Maryland Code, which provides that persons convicted of specified crimes may "file a petition for DNA testing of scientific identification evidence that the State possesses". Johnson sought for testing, a T-shirt recovered from the victim, and a cigarette package recovered from the crime scene as well as access to logbooks maintained by the Charles County Sheriff's Office. He also sought a sex crimes kit obtained from the victim at the Hospital in addition to a further search of the Hospital and discovery of its evidence collection procedures from 1980. The State asserted that it no longer possessed the requested evidence and, as to the sex crimes kit, even had it been found, it would only have contained the victim's blood sample. After three hearings, Judge Helen Harrington dismissed the petition, having determined that the State had conducted a reasonable search and the T-shirt, cigarette package and sex crimes kit no longer existed.

The Judge based her conclusion in part on the testimony of Charles Smith, the civilian evidence custodian of the Charles County Sheriff's Office, who had explained that the building in which evidence from Johnson's case had been held was fully inventoried twice prior to the instant action and searched once in response to Johnson's request; none of these events uncovered the T-shirt, cigarette package or sex crimes kit. Based upon Mr. Smith's testimony, Judge Harrington concluded that the Sheriff's Office no longer possessed the T-shirt, cigarette package and sex crimes kit.

As to the sex crimes kit, Judge Harrington also relied upon the Hospital record compiled by the physician who had examined the victim and the report submitted by the officer who had investigated the case, both of which stated that the sex crimes kit had been removed from the Hospital. The physician's report also indicated that only blood had been taken from the victim and retained, which led Judge Harrington to conclude that the sex crimes kit would only have contained the victim's blood sample.

Held: Affirmed

The Court of Appeals held that it was not clear error for Judge Harrington to dismiss the petition based upon her conclusion that the State no longer possessed the T-shirt, cigarette package or sex crimes kit. The Court, quoting *Washington v. State*, 424 Md. 632, 651, 37 A.3d 932, 942 (2012), held that the State had performed a reasonable search and "demonstrated sufficiently a *prima facie* case, either directly or circumstantially, that the requested scientific identification evidence no longer exists." The Court observed that Judge Harrington had based her opinion upon undisputed evidence that the Sheriff's Office had been fully inventoried and searched without having uncovered the T-shirt, cigarette package or sex crimes kit. The Court also reasoned that the State was not required to produce its logbooks for review, because it was reasonable to assume the Sheriff's Office had properly followed its indexing protocols and Johnson only offered mere speculation of a mistake in logging in the evidence. Regarding the sex crimes kit, documents admitted into evidence had undisputedly shown that the Hospital no longer possessed the kit, nor had anything other than blood been taken from the victim. Finally, the Court concluded that searching the Hospital and adducing its examination procedures from 1980 were unnecessary in light of the evidence showing that the Hospital no longer possessed the sex crimes kit.

State of Maryland v. Kenneth Martin Stachowski, Jr., No. 15, September Term 2014, filed November 20, 2014. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2014/15a14.pdf

CRIMINAL LAW – SENTENCING – RESTITUTION

Facts:

In 2003 and 2004, Petitioner violated Maryland's home improvement regulations codified in Maryland Code (1957, 2008 Repl. Vol.), Business Regulation Article, §8-101 *et. seq*. ("BR"). Petitioner entered into three separate home improvement contracts with different Somerset County residents. After failing to perform the agreed upon work, Petitioner was charged criminally in the District Court of Maryland, sitting in Somerset County, with failing to perform home improvement contracts (in violation of BR § 8-605) and acting as a contractor without a license (in violation of BR § 8-601). As there were three contracts, three separate criminal proceedings were docketed as the units of prosecution.

The charges were resolved through a plea agreement. Petitioner pleaded guilty to failing to perform a home improvement contract in two of the cases and acting as a contractor without a license in the third. The State *nolle prossed* the remaining charge in each case. The District Court imposed a suspended sentence of incarceration, a suspended fine, and supervised probation. As a condition of his probation, the District Court ordered Petitioner to pay restitution to each of the three victims.

When Petitioner failed to make his restitution payments, the State sought to revoke his probation. The District Court determined, after a hearing, that Petitioner violated his probation in each of the three cases. Petitioner appealed to the Circuit Court for Somerset County.

Meanwhile, in an unrelated case, Petitioner was charged with obtaining property or services by issuing a bad check, as well as theft. It was asserted that, in June 2005, Petitioner passed a check of $182.86, drawn on a closed account, to Somerset Well Drilling to obtain services from the company. The case was transferred by the District Court to the Circuit Court, upon Petitioner's request for a jury trial.

On 11 October 2006, the bad check / theft case and the three probation violation home improvement cases were called for trial in the Circuit Court. At the beginning of the proceeding, the State informed the judge that the parties had reached plea agreements to resolve the four cases and announced the terms. Petitioner would plead guilty to the bad check charge, agree to pay restitution to the victims of the home improvement violations, and plead guilty in each of the violation of probation cases. In exchange, the State would *nolle pross* the theft charge and recommend to the judge: (1) an active sentence of five months of incarceration for the bad check charge with the suspended portion at the judge's discretion; (2) the one year and thirty day

sentence of incarceration in the violation of probation cases, and (3) recommend that the sentence of incarceration be served at the Somerset County jail with work release.

The Circuit Court judge accepted the plea agreement and sentenced Petitioner accordingly. In the bad check case, the judge sentenced Petitioner to eighteen months incarceration with all but five months suspended and placed him on probation for five years. Petitioner's probation for the bad check case was contingent on payment of the agreed upon restitution to the victims of the unrelated home improvement cases.

After granting Petitioner leave to appeal the bad check case, the Court of Special Appeals, interpreting the language of Maryland's restitution statute and relevant common law jurisprudence, held that the Circuit Court was without authority to condition probation in the bad check case on the payment of restitution to the victims in the home improvement cases because the latter were unrelated directly to the former, either factually or legally. The Court of Special Appeals struck the restitution requirement of Petitioners' probation, but upheld otherwise the sentence.

The State filed a petition for writ of certiorari with the Court of Appeals, which was granted. *State v. Stachowski*, 436 Md. 327, 81 A.3d 457 (2013). The questions presented were: (1) Did the Court of Special appeals err in holding that a court may not order restitution as part of a plea agreement on a charge as a condition of a probation in another matter before the court, creating uncertainty in conflict with this Court's holdings in *Walczak* and *Lee*? (2) Did the Court of Special Appeals err in vacating only the negotiated and accepted restitution condition required of Petitioner, which was part of the plea agreement, rather than rescinding the entire plea agreement, thus allowing Petitioner the full benefit of his bargain with the State without assuming any of his negotiated burden?

Held: Reversed.

The Court of Appeals held that when the defendant agrees voluntarily and expressly to pay the restitution as part of a valid plea agreement and the trial court has a sufficient factual basis from which to determine the victim's or victims' injury and the defendant's responsibility for it, a trial court has the authority to order, as a condition of probation, a defendant to pay the agreed upon restitution to a victim or victims of criminal activity unrelated to that crime for which the defendant is convicted and probation is ordered.

Kevin E. Jones v. State of Maryland, No. 14, September Term 2014, filed November 19, 2014. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2014/14a14.pdf

CRIMINAL LAW – SECOND-DEGREE ASSAULT – INTENT-TO-FRIGHTEN

Facts:

The State, Respondent, charged Kevin E. Jones ("Jones"), Petitioner, with various criminal offenses, including second-degree assault of the intent-to-frighten type against Christine Johnson ("Johnson").

At trial, as a witness for the State, Byron Johnson ("Byron") testified as follows. On the night of September 17, 2010, Byron and Jones were passengers in a car. Jones said that "he [had] got[ten] into an altercation with two boys" at Wink Lane Apartments. Eventually, the car stopped near Wink Lane Apartments. While Byron remained in the car, Jones exited the car, walked to an apartment's front door, and knocked on it. A woman answered the door. Jones asked for the two boys whom he was seeking. Byron heard "yelling." The woman shut the door, and Byron heard three gunshots. Jones returned to the car and said that "he was going to kill . . . the two boys [whom] he was trying to get."

Nikita Tindley ("Tindley") testified as follows. On the morning of September 18, 2010, Tindley, Johnson, and others were in an apartment at Wink Lane Apartments. Jones knocked on the apartment's front door. Tindley opened the door. Jones asked for the two boys whom he was seeking and reached toward his pants. Tindley shut the door, saw Johnson approaching the door, and said: "[D]on't go to the door[,] they got a gun." Tindley heard three gunshots.

A jury convicted Jones of crimes, including second-degree assault of the intent-to-frighten type against Johnson. Jones appealed, and the Court of Special Appeals affirmed.

Held: Affirmed.

The Court of Appeals held that a defendant can commit second-degree assault of the intent-to-frighten type against a victim of whose presence in particular the defendant does not know. A defendant commits second-degree assault of the intent-to-frighten type only if the defendant commits an act with the intent to place another in fear of immediate physical harm. Where a defendant intentionally commits an act that creates a zone of danger, and where the defendant knows that multiple people are in the zone of danger, the defendant intends to place everyone in the zone of danger in fear of immediate physical harm—even if the defendant does not know of a particular victim's presence in the zone of danger.

The Court of Appeals determined that the evidence was sufficient to support a reasonable inference that Jones knew that multiple people were in the apartment. It was undisputed that Jones knocked on the apartment's front door; Tindley answered the door; and Jones asked for the two boys whom he was seeking. Johnson testified that, after Tindley shut the door, but before she heard the gunshots: (1) Tindley told Johnson: "[D]on't go to the door[,] they got a gun"; and (2) Johnson "hollered" to her grandson: "[G]et down[.]" Byron testified that, while he remained in the car (i.e., while he was farther away from the apartment than Jones was), he heard "yelling." The Court concluded that the evidence was sufficient to support a reasonable inference that Jones knew that people other than Tindley were in the apartment.

The Court of Appeals concluded that the evidence was sufficient to support a reasonable inference that Jones intended to place everyone in the apartment in fear of immediate physical harm. It was undisputed that, while Johnson was in the apartment, Jones intentionally fired a gun three times, and at least two bullets entered the apartment.

Gineene Williams, et al. v. Peninsula Regional Medical Center, et al., No. 18, September Term 2014, filed November 21, 2014. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2014/18a14.pdf

MEDICAL MALPRACTICE LIABILITY – MENTAL HYGIENE LAWS – INVOLUNTARY ADMISSIONS – STATUTORY IMMUNITY

Facts:

Petitioner, Gineene Williams, brought her son Charles Williams, Jr., to Peninsula Regional Medical Center ("PRMC"), where Dr. Michael P. Murphy and mental health worker George Stroop (collectively with PRMC, "the Health Care Providers") examined and evaluated him. Williams had been suffering with suicidal ideation and auditory and visual hallucinations. Upon completing the examination, the Health Care Providers elected not to admit Williams, discharging him to the care of his mother and advising her to remove any firearms from the home. Williams received a discharge diagnosis of "insomnia, fatigue, [and] bizarre behavior," a prescription for the sedative Ambien, and instructions to return if he felt that he would harm himself or others. Shortly before midnight that night, Williams broke into a residence. Officers encountered Williams in the front yard of the residence wielding a knife and saying, "shoot me, f***ing shoot me, somebody's going to die tonight." He then held the knife to his throat and declared, "I want you to shoot me, I want to die." When Williams rushed the officers, they fired their weapons at him, killing him. Plaintiffs Gineene Williams, Patricia Gaines, Michelle Crippen, and Charles A. Williams, Sr. ("the Family") filed a wrongful death and survivorship action against the Health Care Providers in the Circuit Court for Wicomico County, alleging negligence but no bad faith.

The Health Care Providers filed Motions to Dismiss, arguing that the Complaint failed to state a claim upon which relief could be granted, that they were entitled to statutory immunity, and that the Complaint failed to assert that the actions of the Health Care Providers were the proximate cause of Williams's injuries. After hearing arguments, the Circuit Court granted the Motions to Dismiss, concluding that the Health Care Providers were protected from liability by statutory immunity. The Family appealed to the Court of Special Appeals, which affirmed the decision of the Circuit Court.

The Family petitioned the Court of Appeals for writ of certiorari, asking the Court to decide whether Maryland's involuntary admission immunity statute applies to health care providers who evaluate an individual and decide to discharge the patient from psychiatric care.

Held: Affirmed.

The question before the Court unfolded as two distinct issues. As to the first, whether Md. Code (1982, 2009 Repl. Vol.), § 10-618 of the Health-General Article ("HG") and Md. Code (1973, 2013 Repl. Vol.), § 5-623 of the Courts and Judicial Proceedings Article ("CJP") apply to the Health Care Providers generally, the Court concluded that the plain statutory language extends immunity to health care institutions and their agents who evaluate an individual as part of the involuntary admission process. This is because PRMC qualifies as a "facility" under HG § 10-618(b) and Stroop and Murphy qualify as agents or employees of a facility under HG § 10-618(c).

Next, the Court addressed whether HG § 10-618 and CJP § 5-623 apply when the evaluation does not lead to involuntary admission. The Court held that the statutory immunity scheme's restrictions on admittance, when establishing the prerequisites to qualifying for immunity, demonstrate the General Assembly's intent that the immunity extend beyond a decision to admit. The Court also stated that it is of no consequence that the statutory captions of the immunity scheme do not specifically refer to instances in which the decision is not to admit an individual because those captions are mere catchwords and not part of the statutes themselves. This result also conformed to the General Assembly's intent at the time it passed the legislation, as evidenced by its concern for excessive admittance. If the General Assembly's intention was to protect individuals from undue deprivation of liberty, the Court reasoned, it would make little sense to give health care providers an incentive to err on the side of involuntary admittance in order to receive statutory immunity and avoid liability.

COURT OF SPECIAL APPEALS

State of Maryland v. Corey Jones, No. 2425, September Term 2012, filed November 25, 2014. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2014/2425s12.pdf

CRIMINAL PROCEDURE – CORAM NOBIS – LACHES

Facts:

In 1999, appellant, Corey Jones, pleaded guilty, in the Circuit Court for Baltimore City, to using a minor to distribute heroin. He was thereafter sentenced to a term of six years' imprisonment, all but eighteen months of which were suspended, to be followed by three years of probation. While serving that three-year period of probation, Jones violated its terms on multiple occasions and, as a consequence, in 2005, was ordered to serve three years of his suspended sentence.

After completing his 1999 Maryland sentence, which, ultimately amounted to nine years of either incarceration or probation, Jones, in 2011, was charged, in the United States District Court for the District of Maryland, with possession of a firearm by a felon. Upon pleading guilty to that charge, Jones faced a mandatory minimum sentence of fifteen years' imprisonment, under the Armed Career Criminal Act, which provides that an enhanced sentence be imposed upon a defendant convicted of illegal possession of a firearm, where that defendant has three prior convictions "for a violent felony or serious drug offense, or both, and committed on occasions different from one another."

One of Jones's "three previous convictions" was his 1999 Maryland conviction for using a minor to distribute heroin. Without that conviction, Jones would not have faced sentencing under the federal enhancement-statute. Instead he would have faced only an unenhanced sentence of, at most ten years, and, if the Federal Sentencing Guidelines were applied to the unenhanced sentence, he would have faced a further substantial reduction in his sentence.

While awaiting sentencing by the federal district court, Jones filed a petition for a writ of error coram nobis on October 9, 2012, in the Baltimore City circuit court, claiming that his drug conviction should be vacated because his 1999 Maryland guilty plea to using a minor to distribute heroin was not knowingly and voluntarily made. The State responded that, not only was the guilty plea valid, but that, in any event, laches barred the coram nobis relief Jones was requesting, as Jones had unreasonably delayed seeking the relief he was now requesting and the

State had been prejudiced by that delay. The circuit court ultimately granted Jones's coram nobis petition and vacated his conviction

Held: Reversed.

The laches doctrine applies when there is an unreasonable delay in the assertion of one's rights and that delay prejudices the opposing party. When a coram nobis petitioner had an extended period of time to make his claim in a post-conviction petition but failed to do so, and, instead, delayed in making his claim until he filed a coram nobis petition, that delay is unreasonable for the purposes of laches. And, when that delay prejudices the State's ability to re-prosecute the petitioner, the petitioner's coram nobis claim is barred by laches.

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Farrah C. Steward v State of Maryland, No. 1796, September Term 2012, filed August 27, 2014. Opinion by Thieme, J.

http://www.mdcourts.gov/opinions/cosa/2014/1796s12.pdf

CRIMINAL LAW – SUFFICIENCY – DRIVING WITH A SUSPENDED LICENSE

CRIMINAL LAW – TRIAL – JURY INSTRUCTIONS – OFFENSE OF DRIVING WITH A SUSPENDED LICENSE – ACTUAL KNOWLEDGE OR WILLFUL IGNORANCE ELEMENT OF OFFENSE

CRIMINAL LAW – CONSTITUTIONAL LAW – COMPETENCE OF TRIAL COUNSEL

Facts:

On February 22, 2012, Farrah Steward, appellant, was pulled over for a minor infraction while driving a vehicle on Green Street in Havre De Grace, Harford County, Maryland. The officer who conducted the stop checked appellant's license and discovered that it was suspended. Appellant claimed that she did not know that her driver's license was suspended. The officer issued appellant a citation for driving with a suspended license. Following a one-day jury trial in the Circuit Court for Harford County, appellant was convicted on one count of driving with a suspended license. The circuit court subsequently sentenced appellant to serve one year in prison, all but thirty days suspended, to be followed by one year of unsupervised probation.

On appeal, appellant asserted that the evidence presented by the State at trial was insufficient to demonstrate that she either had actual knowledge of the suspension of her license or that she was wilfully blind to the suspension. Appellant also maintained that the jury instruction provided by the circuit court regarding the elements of the offense of driving with a suspended license was plainly erroneous insofar as it lowered the State's burden of proof as to the knowledge element of that offense. Finally, appellant suggested that the failure of her defense attorney to properly preserve her argument regarding the erroneous jury instruction constituted ineffective assistance of counsel.

Held: Affirmed.

Regarding appellant's sufficiency claim, the Court of Special Appeals first determined that appellant's arguments were not properly preserved in the court below, because defense counsel failed to provide any particularized argument in support of his motion for judgment of acquittal at the close of all evidence. Briefly addressing the merits of appellant's argument, the Court opined that based on appellant's multiple previous contacts with the MVA and her failure to inform the MVA about her change of address in a timely manner, the evidence presented at appellant's trial was sufficient to support an inference that appellant's lack of knowledge

regarding the suspension of her license was the result of her own willful inaction and ignorance. Discerning no error in the circuit court's denial of her motion for judgment of acquittal, the Court declined to overturn Steward's convictions on the basis of her unpreserved sufficiency claim.

The Court of Special Appeals declined to exercise its discretion to undertake plain error review of the second issue raised by appellant, *i.e.* whether the trial court erred as a matter of law by instructing the jurors that they could find appellant guilty if they concluded that appellant either knew or "should have known" that her driver's license was suspended. Prior cases establish that an individual cannot be convicted for driving with a suspended license unless there is sufficient evidence that the individual had either actual knowledge or was deliberately ignorant of the suspension of his or her driver's license. The Court opined that proof that an individual "should have known" a fact is not sufficient to prove that the individual was deliberately ignorant of or willfully blind to a fact. Therefore, the court concluded that as a matter of first impression, the jury instruction provided by the trial court was legally incorrect, and, had it been properly preserved, would have constituted reversible error.

However, in light of the nature of the case, the limited guidance available to assist the trial court in crafting its jury instructions as to the elements of the offense, and the absence of any timely objection from either party which would have notified the court regarding its easily corrected error, the Court concluded that the trial court's misstatement of the knowledge element of the offense of driving with a suspended license was not so egregious or extraordinary that the Court was compelled to undertake plain error review.

The Court declined to decide appellant's ineffective assistance of counsel claim on direct appeal.

Joshua P. Brewer, Jr. v. State of Maryland, No. 1325, September Term 2013, filed October 29, 2014. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2014/1325s13.pdf

FOURTH AMENDMENT SEARCH AND SEIZURE – WARRANTLESS SEIZURE OF DRUGS IN VESTIBULE OF ROWHOUSE – DRUGS OBSERVED IN OPEN VIEW - SEIZURE JUSTIFIED BY EXIGENT CIRCUMSTANCES

Facts:

Upon receipt of a confidential report regarding suspected drug activity, Baltimore City Police covertly observed Joshua Brewer engaged in suspected drug sales. With binoculars, Detective Lash observed him running back and forth from and in and out of the rowhouse at 14 North Gilmor and out across the street where individuals were waiting. Brewer handed small items in exchange for cash to a total of at least 14 people.

Detective Lash and two colleagues entered the block to arrest Brewer, who dropped some small objects to the ground and proceeded to stomp upon them. However, he missed a red-topped vial of cocaine. The officers arrested him and recovered the red-topped vial, but could not recover the gel caps that he had stepped upon.

Detective Lash testified that he then walked over to 14 North Gilmor Street, where the clear storm door was unlocked, open and ajar. He approached the door of the property by walking up a stoop. Looking through the glass storm door from outside, Detective Lash could see a large amount of drugs on top of a ledge above the interior door. By going through the unlocked, open storm door, he entered what he characterized as a vestibule and recovered the drugs. The Detective knocked on the interior door and spoke with Brewer's father.

During his testimony, Brewer's father confirmed that anyone wishing to knock on "the main door, the only door" would have to pass through the open storm door into the vestibule area to do so. There was no working doorbell, and mail deliveries were simply tossed into the vestibule area. The solid main door was the one that he "locked at night . . . that was the real door." Anyone could enter or toss deliveries into the vestibule area without knocking on the screen door. Photographs of the vestibule introduced as exhibits at the suppression hearing displayed a short, narrow, uncarpeted corridor with no objects on the floor or walls. The corridor led to a door with double locks on a raised step topped by a palladian window.

Brewer moved to suppress the recovered drugs as an unconstitutional search and seizure, but the motion was denied.

Held: Affirmed.

The motion to suppress was properly denied. On the basis of *Brown v. State*, 15 Md. App. 589 (1972), the Court drew a distinction between evidence observed in "plain view" and that seen in "open view." Police may seize evidence in plain view without a warrant if "there has been a prior valid intrusion." *Id.* at 604. However, the open view doctrine often contemplates a "pre-intrusion visual observation" of evidence located inside a constitutionally protected area from a "vantage point outside" the constitutionally protected area. *Id.* at 605.

If the vestibule was part of the curtilage and a constitutionally protected area, and the detective observed the drugs in a pre-intrusion setting from outside that protected area, he would have seen the drugs in open view, not in plain view after a prior valid intrusion. Under these circumstances, a warrantless entry into the vestibule would have to be justified by exigent circumstances.

Under the open view doctrine, there was nothing impermissible about Detective Lash's observation of the drugs through the glass door while standing on the stoop of Brewer's residence; and the suppression court specifically found that Detective Lash's seizure of the drugs was justified by exigent circumstances. This Court has said that "drugs are peculiarly susceptible to quick destruction." *Archie v. State*, 161 Md. App. 226, 243 (2005). No greater illustration of that fact occurred when Brewer, right in front of the officers, stomped drugs he was selling on the street. Although he was arrested and cuffed and could not destroy drugs inside the house, Detective Lash had no assurance that any person inside the house might not move or, like Brewer, destroy the drugs if he stopped to obtain a warrant. Moreover, an open glass door was the only protection that evidence would receive from the drug purchasers and others outside, who undoubtedly knew that Brewer was obtaining the drugs from inside the home.

The Court distinguished the Supreme Court's decision in *Florida v. Jardines*, _____ U.S. _____, 133 S. Ct. 1409 (2013), which found a Fourth Amendment violation where a drug-sniffing dog was used on the front porch of a residence to investigate an unverified tip that marijuana was being grown on the premises. The Court of Special Appeals said that unlike this case, *Jardines* did "not involve an ordinary visual observation of drugs in open view, made from a place where anyone had a right to be, and a seizure based on exigent circumstances."

The appellate court declined to address the issue of whether the vestibule was curtilage and a constitutionally protected area, but noted:

> [T]he area between the glass storm door and the interior door was a narrow, non-descript, unadorned corridor devoid of the intimate activity associated with the sanctity of a persons' home and the privacies of life. The external door with no doorbell was ajar, a see-through, deliberately open to the world at large, and leading to what the public would readily believe is the real door - - double-locked, on a step with a palladian window. Arguably, there would be no reasonable expectation of privacy in such an area. And the testimony in the case confirmed this description. If the area beyond the storm door was not curtilage, but an extension of the stoop, it would not be a constitutionally

protected area. As a result, police entry would be a non-search and taking the drugs into custody would not raise a Fourth Amendment issue.

Jacqueline Wagner v. State of Maryland, No. 2299, September Term 2013, filed October 30, 2014. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2014/2299s13.pdf

PROPERTY – OWNERSHIP AND INCIDENTS THEREOF

CRIMINAL LAW – DEFENSES

CRIMINAL LAW – NATURE AND ELEMENTS OF CRIME

Facts:

Appellant appeals the decision of the Circuit Court for Baltimore County of October 18, 2013, which found appellant guilty of theft and embezzlement for taking money from a joint bank account. The account was originally opened by her father, who later added appellant as a "joint owner" in case he was unable to access the funds in the account.

Appellant contends that because she was a joint owner of the bank account, she cannot be guilty of theft from that account. In support of her argument, she cites the Financial Institutions Article, which allows funds from a multi-party account to be withdrawn by any party named on the account.

Held: Affirmed.

A person who is named as a "joint owner" of an account may be guilty of theft for taking money from that account. When a person is added as a joint owner, there is a presumption that she has be given an ownership interest in the account. That presumption can be rebutted by evidence of a contrary intent of the original owner of the account.

Appellant was added as a "joint owner" to her father's bank account, but her father did not intend for her to become a joint owner. As a result, despite appellant being titled as a "joint owner," she was not an actual owner of the property. Because her interest in the account was subject to the authority and control of her father, she was not an "owner" within the meaning of the theft statute. Appellant, thus, could be convicted of theft for taking money from an account on which she was named as a "joint owner."

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Troy T. Bryant v. Roxanna K. Bryant, No. 2096, September Term 2013, filed October 30, 2014. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2014/2096s13.pdf

INDEFINITE ALIMONY – CALCULATION OF INCOME

INDEFINITE ALIMONY – UNCONSCIONABLE DISPARITY

Facts:

Husband and Wife divorced after a tumultuous marriage that involved allegations of infidelity and dissipation of assets by Husband. Husband claimed at trial that substantial payments made to him by his employer during the marriage did not constitute marital property, but instead were "loans" that he would be obligated to pay back over time if he were to leave the business. The trial court disagreed, finding that the payments constituted income during the marriage, and therefore marital property for purposes of calculating indefinite alimony. Husband appealed that decision, along with the trial court's finding that an unconscionable disparity in the spouses' standards of living justified the award of indefinite alimony.

Held: Affirmed.

The Court of Special Appeals held that the trial court did not err when it found that payments made to Husband by his employer constituted "income," and therefore marital property, for purposes of calculating indefinite alimony. Husband and his employer characterized certain payments as "loans" that would be forgiven over a period of years as long as he remained with the company. But the Court pointed out the parties arranged this structure only for tax purposes, and as a practical matter Husband and Wife used the funds to live on during their marriage. Accordingly, the trial court's decision that the payments actually were property acquired during the marriage was not clearly erroneous.

The trial court also properly found that an unconscionable disparity existed that justified awarding Wife indefinite alimony: the court properly credited Wife's assertion that she could only be partially self-supporting, and it was within the bounds of its discretion when it declined to credit Husband's claim that he lacked the ability to pay alimony. Moreover, Husband could not demonstrate that the trial court had awarded indefinite alimony only as a punitive measure: the court found that Husband was responsible for the deterioration of the marriage, which factors into the unconscionable disparity analysis.

In re: Adoption/Guardianship of Quintline B. and Shellariece B., No. 92, September Term 2014, filed September 30, 2014. Opinion by Thieme, J.

http://www.mdcourts.gov/opinions/cosa/2014/0092s14.pdf

TERMINATION OF PARENTAL RIGHTS – CHILD IN NEED OF ASSISTANCE (CINA) – PERMANENCY PLANS

Facts:

The Circuit Court for Montgomery County, sitting as a juvenile court, terminated the parental rights (TPR) of Quintline B. Sr. (father) to his children, Quintline B. Jr. and Shellareice B. At the time of the TPR hearing, the permanency plan in the children's Child In Need of Assistance (CINA) case was reunification with father. Prior to the Montgomery County Department of Health and Human Services' initiation of the TPR proceeding, it had moved to change the permanency plan to adoption by a non-relative in the CINA case, and was denied. Father contended that the juvenile court had infringed his due process rights by terminating his parental rights prior to a change of permanency plan in the CINA case, which he could have appealed, had it been changed.

Held: Affirmed.

The existence of a permanency plan of adoption by a non-relative in a CINA case is not necessarily a condition precedent to the initiation of TPR proceedings. It is within a juvenile court's sound discretion to consider or refuse to consider a TPR petition where the permanency plan in the associated CINA case remains reunification. It is not a violation of a parent's rights to due process for a court to consider a TPR petition where the permanency plan in the associated CINA case remains reunification.

Asphalt & Concrete Services, Inc. v. Moran Burdette Perry, No. 2059, September Term 2013, filed October 30, 2014. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2014/2059s14.pdf

NEGLIGENT HIRING – LIABILITY INSURANCE – RELEVANCE – COMPETENCE OF EMPLOYEE – PROXIMATE CAUSE

Facts:

Moran Perry brought suit in the Circuit Court for Prince George's County, seeking compensatory damages for injuries he sustained when he was struck by a dump truck while crossing an intersection. He sued Higher Power Trucking, LLC ("Higher Power"), William H. Johnson, II, and appellant, Asphalt & Concrete Services, Inc. ("ACS"), alleging negligence and negligent hiring and supervision. A jury found that Mr. Johnson's negligence in operating his vehicle was the proximate cause of Mr. Perry's injuries, that Mr. Johnson was an employee of ACS, and that ACS was negligent in hiring Mr. Johnson.

At trial, ACS sought to preclude evidence that, at the time of the accident, Mr. Johnson had a suspended driver's license and the vehicle was uninsured. ACS argued that evidence of Mr. Johnson's suspended driver's license and the lack of insurance on the vehicle should not be admitted because it was not relevant, and it was prejudicial. Mr. Perry argued that this evidence was relevant on the negligent hiring claim because ACS violated its own policies by failing to check whether Mr. Johnson had a valid driver's license or liability insurance before hiring him. ACS argued, among other things, that the evidence of Mr. Johnson's lapse in insurance for nonpayment and his suspended license for a failure to appear was not relevant to the negligent driving claim because it did not indicate that Mr. Johnson would operate a vehicle negligently.

The circuit court agreed that the evidence was not relevant to the negligence count. With respect to the negligent hiring count, however, it found that the evidence was relevant, but only if there was evidence that Mr. Johnson was ACS's agent or employee. After testimony sufficient to support a finding that Mr. Johnson was ACS's employee was adduced, the court admitted the evidence of lack of insurance. Testimony then established that ACS required that people or companies working on its jobs have proof of insurance, driver's license and vehicle registration, and Mr. Johnson had a suspended driver's license, did not have a valid vehicle registration, and the vehicle was not validly insured because of a lapse in payment.

The jury returned a verdict in favor of Mr. Perry. It found: (1) that Mr. Johnson was the agent, servant and/or employee of ACS; (2) that ACS was negligent in hiring Mr. Johnson; (3) that Mr. Johnson was negligent in operating his vehicle and that negligence was the proximate cause of Mr. Perry's injuries; and (4) that Mr. Perry was not contributorily negligent. It awarded Mr. Perry a total of $529,500, $29,500 for past medical expenses and $500,000 for pain and

suffering, physical impairment, diminished quality of life, and inconveniences in the past and future.

Held: Reversed and remanded.

Maryland requires that a person driving a vehicle have liability insurance. A lack of liability insurance, depending on the circumstances, may be relevant to the issue of whether an employer hired a competent person to perform the job for which he was hired.

If an employer hires an incompetent driver without liability insurance, the lack of insurance must be the proximate cause of an injury. To generate a claim for negligent hiring, there must be evidence that the contractor's alleged unfitness was directly related to the way the injured party was harmed. Mr. Johnson's lack of insurance coverage did not cause the accident; rather, it was Mr. Johnson's negligent driving that caused Mr. Perry's resulting injuries and damages. Because there was no causal link shown between Mr. Johnson's lack of insurance due to nonpayment and the accident, the lack of insurance was not relevant to the claim of negligent hiring.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated November 7, 2014, the following attorney has been suspended by consent for two years:

SANDY YEH CHANG

*

By an Order of the Court of Appeals dated October 9, 2014, the following attorney has been disbarred by consent, effective November 10, 2014:

PAMELA ANN FISH

*

By an Order of the Court of Appeals dated November 14, 2014, the following attorney has been disbarred by consent:

CLAIRE ELIZABETH KOZEL

*

By an Opinion and Order of the Court of Appeals dated November 20, 2014, the following attorney has been disbarred:

GAYTON J. THOMAS, JR.

*

By an Order of the Court of Appeals dated October 21, 2014, the following attorney has been suspended for thirty days by consent, effective November 20, 2014:

MITCHELL A. GREENBERG

*

By an Opinion and Order of the Court of Appeals dated November 21, 2014, the following attorney has been indefinitely suspended:

CHRISTOPHER W. POVERMAN

RULES ORDERS AND REPORTS

A Rules Order pertaining to Rules 20-405 and 20-406 was filed on November 6, 2014:

http://www.mdcourts.gov/rules/rodocs/mdecro20141106.pdf